

June 26. 1766.

A N S W E R S

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LEONARD URQUHART Writer to the Signet,

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The PETITION of Roderick Macleod of Cadboll and others, standing upon the roll of freeholders for the county of Cromarty.

AFTER the attention which in these later times has been so particularly bestowed upon that branch of the law of Scotland which respects the conduct of elections, and after so many ingenious men have been for a tract of years employing their talents in searching out devices for turning those laws to their own advantage, it might naturally have been imagined that the store of political expedients which the law of this country can furnish, had been by this time exhausted, and that the candidates of these present days would have had nothing more to do, but servilely to copy after the example of their predecessors.

Such, however, is the fertility of human invention, especially when prompted by the warm spirit of ambition, that the experience of every day demonstrates, that many new devices may still be discovered that never have been known, and never thought of by any former politician. Of this ob-

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servation the petition now to be answered affords a very striking instance.

The respondent is called as defender in a summons of wakening, brought with a view to revive against him the procedure upon a summary complaint, founded upon the act of the 16th of his late Majesty, and originally carried on at the instance of two persons, who are long since deceased; a species of wakening, it is believed, hitherto unprecedented in the forms or practice of this court.

A petition has also been presented, craving, That your Lordships would resume the consideration of the above-mentioned complaint; and after advising the same, with the answers that were given in thereto upon the part of the respondent, would immediately grant warrant for expunging him from the roll of freeholders for the county of Cromarty.

With regard to the merits of the original complaint itself, the respondent thinks it unnecessary to say one word; nor does he think it incumbent upon him to give the petitioners the satisfaction of informing them upon what title it was that, in the year 1743, the period of exhibiting the complaint, he stood inrolled upon the list of freeholders for the county of Cromarty. These are questions into which the respondent expects that your Lordships will not now think yourselves at liberty to enter, but will, immediately upon considering the nature of this application itself, determine to reject it, as altogether absurd and incompetent.

Your Lordships will therefore observe, that the complaint which is now sought to be revived at the instance of Macleod of Cadboll, and the other petitioners, is a complaint brought originally against the respondent in name of Sir James Mackenzie of Roystoun, and Mr John Mackenzie of Highfield, both of them now deceased; that the complaint was presented to your Lordships upon the 28th June 1743, in terms of a statute which had passed a short time before, empowering any freeholder, within a short limited

ed time, to complain against any person standing upon the roll without being possessed of a sufficient title; and that the last step of procedure upon this complaint was upon the 5th June 1744.

The respondent therefore does, in the *first* place, maintain, That as Sir James Mackenzie, and Mackenzie of Highfield, the original complainers, did not think proper to insist in their complaint, or to pursue it to a conclusion, it cannot now be taken up, either at the instance of Macleod of Cadboll, or of any other person. That this is a general rule with regard to actions, whether brought in the form of an ordinary summons, or by way of summary complaint, is not disputed; as the rule is indeed founded both in law and in sound reason. But, in order to obviate this difficulty, the petitioners attempt to make out a distinction betwixt actions and complaints of an ordinary nature, and those which are founded upon any of the statutes respecting the elections of a member of parliament.

The principal argument which the petitioners make use of in order to establish their proposition, is, by pointing out to your Lordships the manifold disadvantages which would follow, if processes of this nature could be insisted in by no other person but the original complainers: That as a complaint of this kind is not properly descendible to heirs, seeing an heir can pretend no interest in adjusting the roll of freeholders of a county, unless he himself have the character of a freeholder; and as the time for bringing such complaints is generally confined by statute within very short limits, it might often happen, by the death of the complainer, or by some other accident, unless it were held that any other of the freeholders is intitled to take up the complaint, and to insist in it in his own name, that many glaring wrongs might be committed, and yet all access be shut up for redress.

Although the consequence of refusing to allow a summary complaint brought by one freeholder, and then abandoned
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by him, to be thereafter revived and carried on at the instance of another freeholder, were truly such as the petitioners have here represented; and that, by this means, it might once or twice happen, in the course of a great many years, that a political complaint might be obliged to be dropped, through want of a person properly intitled to carry it on to the conclusion; yet the respondent cannot persuade himself, that your Lordships would think the loss very much to be regretted. Any illegal step taken in the course of an election, like every other wrong, ought no doubt to be redressed by the law of this country; and accordingly the wisdom of parliament has enacted such regulations as were thought sufficient for insuring that redress in every case where it was necessary: but that the legislature did not esteem it a matter essential to the welfare of the nation, that a complaint of this kind should be commenced and rigorously carried on to a conclusion, in every case where there was foundation for one, is abundantly apparent from the whole tenor of the statutes upon that subject. It must have easily been foreseen, that the shortness of the time within which these actions are always ordained to be brought after the wrong has been committed, must often put it in the power of a thousand various accidents to prevent any action from being brought at all.

At any rate, this observation of the petitioners will by no means apply to the present case. Mackenzie of Highfield, one of the original complainers, lived many years after all procedure upon the complaint had been stopped; and it will not be pretended, that this gentleman had not the fullest time and opportunity of bringing this affair to a conclusion, if he had not rather chosen to abandon it entirely.

The petitioners have also appealed to the decision in the late case of Colonel James Sinclair and others, against the Honourable Hugh Mackay of Bighouse, where they endeavour to show, that the doctrine maintained upon their part has already received the sanction of your Lordships authority.

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But upon examining the circumstances of this decision, as they are very fully narrated in the petition, your Lordships will observe, that the case of Colonel Sinclair and the freeholders of Sutherland is widely different from that which is now under consideration. — Colonel Sinclair and William Sutherland of Sibbercross, the two claimants, were refused to be inrolled by the freeholders of the shire of Sutherland. The judgment, therefore, of the freeholders, refusing to sustain these gentlemens claims, was truly the act and deed of the whole body of freeholders; and although Mackay of Big-house was the only person cited as defender in the complaint that was brought by the two claimants, agreeable to the terms of the statute, which in order to save the expence of serving a complaint upon every one of the freeholders in a county, appoints only, that it shall be served against the person upon whose objection the claimant was refused to be admitted; yet the whole other freeholders had the same interest with the objector to support the decision; and upon his withdrawing an objection, your Lordships thought it but reasonable that the other freeholders should be allowed to appear for their interest, and to take up the defence of their own judgment in his place. But in the present case, the respondent, at the date of this original complaint, stood upon the roll in the shire of Cromarty, by virtue of a judgment of the whole freeholders. The only persons who pretended to quarrel or attack his title, were those two persons at whose instance the complaint was brought. All the other freeholders who did not complain, must be supposed to have been perfectly well satisfied, and to have acquiesced in the respondent's title as a good and valid one. It does not appear, therefore, that either Cadboll, or any other freeholder standing upon the roll at that time, can pretend, that he has either an interest or a title at this distance of time; seeing it must be presumed, from his not joining with the complainers, which he had full opportunity to do, that he concurred

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with the body of the freeholders, who had no objections to keeping the respondent upon their roll.

The respondent does, in the next place, maintain, That although Cadboll and the other persons were not now attempting to take up an action commenced at the instance of persons long since deceased, but had themselves been parties to the original complaint; yet that the length of time since that complaint was desisted from, and the subsequent acquiescence of all parties concerned in the respondent's title, would be a sufficient defence against allowing it to be again revived.

2^o Geo. II.

In the statute upon which the complaint brought against the respondent was founded, and in all the other statutes which have been enacted upon this subject, the court of session is appointed "to proceed in a summary way to hear and "determine upon such complaint;" and in one particular case it is ordained, that the prosecution shall be "carried on "without any wilful delay;" although the legislature has indulged parties who apprehend that any wrong has been committed in the conduct of an election, with the liberty of complaining; however, it appears evident, from the whole strain of these statutes, that the intendment of the legislature was, that such complaints should be confined within very narrow limits; and that unless they were not only commenced within the time appointed, but also speedily brought to a conclusion, they should for ever after be put to silence.

The respondent does not say, that the law has established any express rule of prescription, declaring in what number of years a complaint of this kind, if not followed out, shall be held to be extinguished; but he maintains, that where a party, after bringing such a complaint, has allowed it to lie over for a considerable tract of years, he must, from the nature of the thing, be presumed to have relinquished it altogether. What number of years will be sufficient to infer this presumed dereliction, must be determined according to the circumstances of the case. With regard to the particular case of this respondent,

respondent, it is now upwards of twenty years since the complaint now sought to be revived was abandoned by the persons at whose instance it was originally brought; and, during all that time, the respondent has stood upon the roll, has voted at elections, and exercised every other privilege competent to a freeholder, without any challenge being ever made to his title upon the grounds contained in that complaint, till the Michaelmas head-court held in November last. Nor can it be pretended that this acquiescence of all parties concerned arose from the want of a person legally intitled to carry on the complaint. John Mackenzie of Highfield, one of the complainers, lived for more than ten years after the last step of procedure that was taken in the complaint itself.

Here therefore is a sufficient proof, that the action against the respondent has been long since relinquished by the persons who brought it; and that such dereliction has been approved of, and the validity of the respondent's title acquiesced in by the whole other freeholders. It will not be denied, that an express approbation of the respondent's title, and a discharge of any complaint against him, granted by any one freeholder, would be sufficient to bar that particular freeholder from challenging the same in time coming. And the respondent takes it to be an established rule, that in a case of this kind, a consent inferred from such strong circumstances, and declared *rebus ipsis et factis*, will have the same effect to secure his title from challenge, as a consent formally expressed in words or writ, would have had. This observation, it is believed, would alone be sufficient to exclude Cadboll, who, it appears, was a freeholder at the time when this complaint was presented, and who has been for more than the space of twenty years equally well intitled to take up this complaint, as he is at present. As for the other petitioners, their names seem to have been put in there rather by way of ornament to the petition, or with a view of publishing to the world their newly-acqui-

red dignities, than from any prospect of their giving the least aid or assistance to the cause itself.

The argument which the respondent is now maintaining, with regard to the duration of summary complaints in election-matters, applies more strongly to the particular case of those very complaints, which, like the present, were founded upon that clause of the act of the 16th of his late Majesty, whereby any freeholder was impowered, at any time betwixt the date of the act, and the 1st of December 1743, to enter a complaint to your Lordships against all such persons as were at that time standing upon the roll without sufficient titles.

It happened, as might naturally have been expected, that immediately after passing this act, a great variety of complaints, founded upon the above-mentioned clause, were presented to your Lordships, from almost every one county in Scotland. The principal purpose of these complaints seems to have been, to oblige the sundry freeholders to produce their respective titles, to be strictly examined into, in order that where-ever there was the least suspicion against a freeholder's title, the time limited by statute might not be allowed to elapse. It happened in many cases, that the complainer, either upon production of the defender's titles, or in some other manner, was convinced that his suspicions had been groundless; and when this happened, the defender was seldom at the trouble of obtaining an absolutor; the complaint was only allowed to lie over, as the present has done, without being farther insisted in; and was understood by all parties to be entirely departed from. The respondent, upon inquiry, finds, that in one single office there are complaints entered, about this period, against upwards of twenty persons standing upon the roll of freeholders, which have been allowed to lie over in this manner, without having ever received a final determination: and there is no doubt that, upon inquiry, an equal number would be found in all the other offices. The respondent need hardly suggest to your Lordships,

Lordships, what a plentiful source of trouble and litigation would be here opened up, if your Lordships were to find that all these numerous complaints, which are now lying dormant in the several clerks offices, and have been long since abandoned by the original complainers, and forgot by the defenders themselves, might now be resumed, at the instance of any one freeholder, whose political views should render it convenient for him to have them revived.

There is one circumstance in the conduct of Macleod of Cadboll, stated in this petition, which sufficiently explains the sense which he himself, till of late, entertained of this matter. In 1753, about eight or nine years after the complaint at the instance of Sir James Mackenzie and Mackenzie of Highfield had been entirely dropped, when a new political contest had again rendered it necessary to make some efforts for having the respondent expunged from the roll, objections were lodged against him, in the names of Macleod of Cadboll and Mackenzie of Highfield, founded, not upon defect in his original title, which was the plea maintained in the summary complaint, but craving that he, and the other defenders in the complaint, should be turned off from the roll, "upon account of an alteration in their circumstances since they were inrolled," the estate of Sir William Gordon, in the county of Cromarty, from which they derived their right to vote, having been, since the period of their inrolment, as the objectors said, disposed of at a judicial sale. If Cadboll, or the able counsel by whose assistance he was at this time directed, had ever once imagined that the propositions now maintained by him were in the least degree tenible, and that the former complaint might be again revived, either at the instance of Highfield, one of the persons who had presented it, after having been sopited for so long a time, or at the instance of Macleod of Cadboll, one of the freeholders who had never complained, these gentlemen would never have used the circuit of lodging objections against the respondent, proceeding
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upon an entirely different medium ; nor would they have taken the trouble of entering a complaint to your Lordships, against Sir John Gordon of Invergordon, for omitting to hold a head-court ; alledging, amongst other things, that by this means they had been deprived of an opportunity of having these objections fairly discussed. And if an application for reviving the summary complaint was thought improper in the 1753, much more will your Lordships judge it incompetent when brought in the 1766.

It is hoped, therefore, that your Lordships will have no difficulty to pronounce a judgment, refusing the prayer of this petition, and finding the petitioners liable in full expences.

In respect whereof, &c.

ROBERT BLAIR.

